



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 30, 1994

Mr. Michael D. Chisum  
General Counsel  
Texas State Board of Examiners  
of Psychologists  
9101 Burnet Road, Suite 212  
Austin, Texas 78758

OR94-862

Dear Mr. Chisum:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26635.

The Texas State Board of Examiners of Psychologists (the "board") has received a request for "any public information your office has in the matter of Fernando Jorge Obledo, Ph.D." You have submitted the requested information to us for review and claim that sections 552.101, 552.103, and 552.108 of the Government Code except it from required public disclosure.

Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston

[1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5; 511 (1988) at 3. For purposes of section 552.103, this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7.

You say that the requested information relates to an ongoing investigation for alleged violations of state laws governing the conduct of psychologists licensed by the board. You say that it is anticipated that this investigation will culminate in an administrative contested case before the State Office of Administrative Hearings. You also say that the attorney responsible for reviewing this matter has determined that the requested information is directly related to the anticipated litigation.

The opposing party to the anticipated litigation, however, has previously had access to the some of the submitted records. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Accordingly, the previously released information may not be withheld from required public disclosure under section 552.103(a) of the Government Code.<sup>1</sup> The remainder of the submitted information, however, may be withheld under section 552.103(a).<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

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<sup>1</sup>In addition, we note that the previously released information may not be withheld under the attorney-client privilege or under section 552.108 of the Government Code. Information may not be withheld under the attorney-client privilege once it has been made available to the opposing party in litigation. *See* 36 TEX. JUR. *Evidence* § 533. Section 552.108 does not apply in this instance because the board is not a "law enforcement agency" for purposes of the Open Records Act.

<sup>2</sup> We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

LRD/GCK/rho

Ref.: ID# 26635

Enclosures: Submitted documents

cc: Ms. Gloria C. Carillo  
Administrator  
Board of Psychologist Examiners  
State of New Mexico  
P.O. Box 25101  
Santa Fe, New Mexico 87504-5101  
(w/o enclosures)